No. 14779

In the United States Court of Appeals for the Ninth Circuit

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 183, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTION

This case is before the Court upon the petition of Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 183, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL (hereinafter referred to as the Union) to review the decision and order of the National Labor Relations Board (R. 26–28)[1] dismissing

[1] References to portions of the printed record are designated "R." Wherever, in a series of references, a semicolon appears, references preceding the semicolon are to the Board's findings; those following are to the supporting evidence.

a complaint issued against Homer W. Robinson d/b/a Alaska Beverage Co., pursuant to a charge filed by petitioner under Section 10 of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151 *et seq.*),[2] herein referred to as the Act. This Court has jurisdiction under Section 10 (f) of the Act, inasmuch as the Company's place of business is in, and the unfair labor practices allegedly occurred at, Fairbanks, Alaska, within this judicial circuit. The Board's decision and order is reported at 111 N. L. R. B. 995.

COUNTERSTATEMENT OF THE CASE

Pursuant to a charge filed by the Union, the General Counsel caused a complaint to be issued alleging, *inter alia,* that the Company violated Section 8 (a) (5) and (1) of the Act by refusing to bargain collectively in good faith with the Union as the exclusive representative of the Company's employees. Thereafter, following the usual proceedings, the Board, without determining the merits of the unfair labor practice charged, dismissed the complaint on the grounds that the Company's operations, although within the Board's jurisdiction, did not have a sufficiently significant impact upon interstate commerce to meet the standards established by the Board for asserting its jurisdiction. The proceedings, which relate to the propriety of the Board's dismissal of the complaint, may be briefly summarized as follows:

[2] The pertinent statutory provisions are reprinted as an Appendix, *infra*, pp. 25–32.

I. The Board's findings of fact

A. Background

In June 1953, following an election conducted by the Board among the Company's employees, the Union was certified as the exclusive bargaining agent of the employees working at the Company's plant in Fairbanks, Alaska, excluding all supervisory employees (R. 18–19; 7, 8, 12). Thereafter, pursuant to a charge filed by the Union against the Company, the Regional Director issued a complaint alleging, *inter alia,* that since about April 23, 1954, the Company had refused to bargain with the Union as the collective bargaining representative of the employees (R. 17–18; 3–10, 29–30). Answering the complaint, the Company denied the commission of the unfair labor practices, asserted that it had bargained and was ready to bargain in good faith at all times material to the complaint and, as an affirmative defense, alleged that the Union was guilty of various unfair labor practices (R. 18; 11–17). The case was scheduled for hearing, and a full hearing was had upon the complaint before a Trial Examiner (R. 18).

B. The business operations of the Company

The undisputed facts relating to the business operations of the Company, as shown by the pleadings and the evidence adduced at the hearing, are as follows: Alaska Beverage Co., a copartnership of which Homer W. Robinson is the sole active partner, maintains its office and principal place of business in Fairbanks, within the Territory of Alaska (R. 18, 27; 7, 11). In the course of its business of manufacturing, selling,

and distributing carbonated beverages, most of the Company's purchases, consisting largely of sugar and concentrates, come from sources located outside the Territory of Alaska (R. 18, 27; 30–31). All of the Company's sales are made locally within the Territory (R. 18, 27; 31). On an annual basis, the Company's purchases amount to approximately $75,461, 95 percent of which (or $71,688) are of goods shipped into the Territory of Alaska from points located outside the Territory (R. 18, 27; 30–31). Total sales amount to approximately $226,000 annually (R. 18, 27; 31).

Upon these facts, the Trial Examiner concluded that the Company's operations were insufficient to satisfy the minimal requirements established by the Board in 1954 for the assertion of its jurisdiction over commerce in the case of *Jonesboro Grain Drying Cooperative,* 110 N. L. R. B. 481, 483–484. Although under the jurisdictional standards formulated in 1950 the Board exercised the full reach of its statutory power in the Territories,[3] the Trial Examiner noted (R. 19–22) that since the revision of these standards in 1954 the Board in three cases had refused to assert jurisdiction over various industries located in the Territories. *The Virgin Isles Hotel, Inc.,* 110 N. L. R. B. 558; *Sixto Ortega,* 110 N. L. R. B. 1917; *Union Cab Co.,* 110 N. L. R. B. 1921. In so refusing, the Board reasoned that similar industries located in

[3] See, for example, *Panaderia Sucesion Alonso*, 87 N. L. R. B. 877, 878 (Puerto Rico); *Northern Fisheries, Inc.*, 33 N. L. R. B. 919, 920 (Alaska); *Inter-Island Steam Navigation Co.*, 34 N. L. R. B. 132, 133–134 (Hawaii); *N. L. R. B.* v. *Gonzales Padin Co.*, 161 F. 2d 353 (C. C. 1) (Puerto Rico).

one of the States would not be regarded as having sufficient impact upon interstate commerce to warrant asserting jurisdiction, and the impact upon commerce was no greater because these industries were located in the Territories (R. 21). Accordingly, in the instant case, perceiving no basis for applying some, but not other, State jurisdictional standards to the Territories, the Trial Examiner reasoned that the necessary result of these cases was to make the State jurisdictional criteria applicable "in all respects" to the Territories (R. 23). Accordingly, as the Company's operations failed to satisfy the criteria set forth in the *Jonesboro* case, the Examiner dismissed the complaint on the ground that the Company's operations did not have sufficient impact upon commerce to warrant the assertion of jurisdiction (*ibid.*).

II. The Board's decision and order

Approximately 3 months later, while the case was pending before the Board on exceptions to the Examiner's report, the Board reapprised its jurisdictional policies respecting the Territories in connection with its decision in *Conrado Forestier, d/b/a Cantera Providencia,* 111 N. L. R. B. 848. In this decision, the Board, with one member dissenting, concluded that instead of exercising the full reach of its statutory power as it had theretofore, it would better effectuate the policies of the Act to confine its jurisdiction to those businesses having a significant impact upon commerce in the Territories in the same manner as it limited jurisdiction with respect to businesses in the States. In the *Conrado Forestier* case the Board explained, as follows (*ibid.*):

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> Since the promulgation of the new jurisdictional standards, the Board has held where specially applicable rules have been established, similar enterprises situated in the Territories are required to conform to the same jurisdictional criteria as are applicable in the 48 States.[1] In these earlier cases, the Board indicated that no exceptions to the Territories was warranted: that the impact on commerce of business operations having their situs in the Territories is no greater than that of similar enterprises located in the 48 States. * * * Accordingly, * * * in future cases the Board's entire jurisdictional standards will be uniformly applied in the Territories as in the several States.

[1] *The Virgin Isles Hotels, Inc.*, 110 N. L. R. B. 558 (hotel); *Sixto Ortega d/b/a Sixto*, 110 N. L. R. B. 1917 (retail bakery); *Union Cab Company*, 110 N. L. R. B. 1921 (local taxicab operation).

When the instant case came before the Board for decision, the Board adopted the Examiner's findings of fact regarding the business operations of the Company and, relying upon the *Jonesboro* and *Forestier* decisions, concluded that it would better effectuate the policies of the Act not to assert jurisdiction, which could only be justified in this case on the theory of the Board's "plenary power" in the Territories (R. 26–27). Accordingly, the Board affirmed the Examiner's dismissal of the proceedings without reaching the merits of the unfair labor practices charged (R. 27–28).

QUESTIONS PRESENTED

I. Whether the Board has discretionary authority to decline jurisdiction in proceedings brought before it respecting a business operating in a Territory where the Board, in its judgment, finds that such action would best effectuate the policies of the Act.

II. Whether the Board's determination not to assert jurisdiction in the case at bar was a reasonable exercise of the Board's discretion.

ARGUMENT

I. The Board has discretionary authority to decline to assert jurisdiction where it finds that such action would best effectuate the policies of the Act

A. The Board's broad powers under Section 10 of the Act

Settled law establishes that the Board, notwithstanding its statutory power, may decline to assert jurisdiction if in its reasoned judgment the policies of the Act would be best effectuated by adopting that course. The source of the Board's authority to decline jurisdiction, long exercised for a variety of reasons,[4] including the insubstantiality of the enterprise's impact on commerce,[5] stems from Section 10 of the Act which vests "in the Board complete discre-

[4] See, e. g., *Aluminum Co. of America*, 1 N. L. R. B. 530, 537, 538; *Shenendoah Dives Mining Co.*, 11 N. L. R. B. 885, 888; *Ellicott Machine Corp.*, 54 N. L. R. B. 732, 735; *Timken Roller Bearing Co.*, 70 N. L. R. B. 500, 501; *Allis-Chalmers Mfg. Co.*, 72 N. L. R. B. 855, 856; *Victor Products Corp.*, 99 N. L. R. B. 516, 519; *Deena Artware, Inc.*, 112 N. L. R. B. No. 44.

[5] See, e. g., *Lacey Milling Co.*, 48 N. L. R. B. 914, 915; *Johns-Manville Corporation*, 61 N. L. R. B. 1, 2; *McDonald Cooperative Dairy Co.*, 58 N. L. R. B. 552, 553; *S & R Baking Co.*, 65 N. L. R. B. 351, 352; *Olympia Stadium Corp.*, 85 N. L. R. B. 389, 390; *The White Sulphur Springs Co.*, 85 N. L. R. B. 1487, 1488.

tionary power to determine in each case whether the public interest requires it to act." *N. L. R. B.* v. *Newark Morning Ledger Co.*, 120 F. 2d 262, 268 (C. A. 3), certiorari denied, 314 U. S. 693. Thus, under Section 10 (a) of the Act, the Board is "empowered", not "directed", to prevent any person from engaging in any unfair labor practice affecting commerce, and Section 10 (b) confers upon the General Counsel of the Board the "power," not the mandatory obligation, to issue a complaint upon the filing of unfair labor practice charges. Congress thereby plainly manifested its intention that "the Board's jurisdiction was not to be exercised unless in the opinion of the Board the unfair labor practice complained of interfered so substantially with the public rights created by Section 7 as to require its restraint in the public interest." *Local Union No. 12, et al.* v. *N. L. R. B.*, 189 F. 2d 1, 4 (C. A. 7), certiorari denied, 342 U. S. 868. See also, *Haleston Drug Stores* v. *N. L. R. B.*, 187 F. 2d 418, 420–422 (C. A. 9), certiorari denied, 342 U. S. 815; *N. L. R. B.* v. *Newark Morning Ledger Co.*, 120 F. 2d 262, 268 (C. A. 3), certiorari denied, 314 U. S. 693.

Accordingly, both with respect to the original Act and the Act as amended in 1947, the courts have recognized that, despite the existence of legal jurisdiction in the Board, issuance of an unfair labor practice complaint may be withheld,[6] and even where a

[6] *N. L. R. B.* v. *Indiana & Michigan Electric Co.*, 318 U. S. 9, 18–19; *Anthony* v. *N. L. R. B.*, 132 F. 2d 620, 621 (C. A. 9); *Lincourt* v. *N. L. R. B.*, 170 F. 2d 306, 307 (C. A. 1); *N. L. R. B.* v. *National Broadcasting Company*, 150 F. 2d 895, 899 (C. A. 2);

complaint has issued the Board may "properly" dismiss without determining the merits of the alleged unfair labor practices,[7] if in its opinion this course would best effectuate the policies of the Act.. As this Court explained in *N. L. R. B.* v. *M. L. Townsend,* 185 F. 2d 378, 383, certiorari denied, 341 U. S. 909, "Many factors such as lack of funds or the imminence of a more drastic disruption of commerce in another industry might dictate that in a particular case powers explicitly granted should not be exercised." See also *Haleston Drug Stores, Inc.* v. *N. L. R. B.,* 187 F. 2d 418, 421–422 (C. A. 9), certiorari denied, 342 U. S. 815. Indeed, the Board's practice of declining to exercise its jurisdiction because of the insignificant impact upon commerce is in precise accord with the purpose, expressed in Section 1 of the Act, "to elimi-

Wilke v. *N. L. R. B.*, 15 Labor Cases, par. 64798 (C. A. 4); *N. L. R. B.* v. *The Barrett Company*, 120 F. 2d 583, 586 (C. A. 7); *General Drivers, Chauffeurs and Helpers* v. *N. L. R. B.*, 179 F. 2d 492, 494–495 (C. A. 10); *Progressive Mine Workers* v. *N. L. R. B.*, 3 Labor Cases, par. 60133 (C. A. D. C.); *White* v. *N. L. R. B.*, 9 LRRM 657 (C. A. D. C.). See also *Jacobsen* v. *N. L. R. B.*, 120 F. 2d 96, 100 (C. A. 3).

[7] *N. L. R. B.* v. *Denver Building & Construction Trades Council*, 341 U. S. 675, 684; *N. L. R. B.* v. *Indiana & Michigan Electric Co.*, 318 U. S. 9, 19; *Haleston Drug Stores, Inc.* v. *N. L. R. B.*, 187 F. 2d 418, 422 (C. A. 9), certiorari denied, 342 U. S. 815; *N. L. R. B.* v. *Daboll*, 216 F. 2d 143, 144–145 (C. A. 9), certiorari denied, 348 U. S. 917; *N. L. R. B.* v. *Federal Engineering Co.*, 153 F. 2d 233, 234 (C. A. 6); *Local Union No. 12* v. *N. L. R. B.*, 189 F. 2d 1, 4–5 (C. A. 7), certiorari denied, 342 U. S. 868; cf. *Brooks* v. *N. L. R. B.*, 348 U. S. 96, 104, n. 16, where the Supreme Court took notice of recent changes in the Board's "jurisdictional yardsticks" and the Board's broad discretion in exercising its statutory powers.

nate the causes of certain *substantial* obstructions to the free flow of commerce." [Emphasis supplied.]

Thus, abundant judicial authority establishes, as the language of the Act plainly states, that the Board may decline to exercise its statutory powers if, in its considered judgment, the policies of the Act would be better effectuated by refusing to exercise its powers.

B. The Board has such discretionary authority to decline jurisdiction with respect to business enterprises located in the Territories

These judicial principles establishing the authority of the Board to decline jurisdiction over interstate enterprises located in the States likewise establish, we submit, that the Board has discretionary authority to decline jurisdiction over a business located in one of the Territories. For, regardless of the location of the business which is the situs of the labor dispute, the considerations respecting the effectuation of the policies of the Act and the limitations of the Board's resources for dealing with such disputes remain constant. Thus, "the imminence of a more drastic interruption of commerce in another industry," as this Court observed in *N. L. R. B.* v. *M. L. Townsend,* 185 F. 2d 378, 383, certiorari denied, 341 U. S. 909, may compel the Board to decline jurisdiction in a particular case, regardless of whether that business is located in a Territory or one of the States. And similarly, the "lack of funds" (*N. L. R. B.* v. *Townsend, supra*) or other limitations of time and personnel require the Board to husband its resources—deciding only the more important cases in order better to effectuate the purposes of the Act—regardless of whether the business operation is State or Territorial. Indeed, unless

the Board has the power to decline to exercise its jurisdiction over a Territorial business, the Board would have to exercise jurisdiction over small Territorial business no matter how insignificant. Necessarily the Board's resources would be consumed in deciding minor labor disputes arising within the Territories at the cost of neglecting those disputes arising in the States or Territories which substantially affect interstate commerce.

Contrary to petitioner's claim (Pet. br. pp. 4, 7, 15, 17) the existence of the Board's authority to decline jurisdiction over business enterprises in the Territories is fully consistent with the language of Section 2 (6) of the Act which defines commerce broadly to include "trade * * * within * * * any Territory." Admittedly, as petitioner asserts (Pet. br., pp. 6, 9) this language authorizes the Board to exercise its powers widely in the Territories, even with respect to those operating wholly inside the boundaries of a Territory. Obviously, however, the grant of such extensive power to the Board does not mean that the Board lacks all discretion to decline jurisdiction but must exercise its powers to the fullest in every instance. To the contrary, by using this broad language Congress manifested its intention to confer discretionary power upon the Board to refuse jurisdiction. For, as the Supreme Court observed in *Addison* v. *Holly Hill Fruit Products, Inc.,* 322 U. S. 607, 611, "when Congress wants to give wide discretion it uses broad language. * * * [Thus], in the National Labor Relations Act Congress gave the Board the authority to take such action 'as will effectuate the policies of

this Act.' * * * The 'policies' of the Act were so broadly defined by Congress that the determination of the relation of remedy to policy is peculiarly a matter for administrative competence." [Citations omitted.] The Court, in the *Holly Hill* case, expressly distinguishing the situation under the National Labor Relations Act, held that in view of the exemptions enumerated by Congress in the Fair Labor Standards Act (29 U. S. C. Sec. 203), the Administrator lacked authority to alter the scope of that statute in any other manner by administrative interpretation. Moreover, petitioner's argument proves too much. For, if the mere grant of such extensive power to the Board respecting the Territories compels the Board to exercise that power in the Territories, parity of reasoning requires the Board to exercise its extensive power respecting interstate businesses in the States. Uniform judicial precedent, however, is to the contrary (*supra,* pp. 7–10).

Neither is there any merit to petitioner's contention (Pet. br., pp. 5–6, 18) that the Board's refusal to assert jurisdiction would empower a Territory to assert jurisdiction and thereby conflicts with the provisions of Section 10 (a) of the Act which prescribes the conditions for the cession of Board jurisdiction to the States and Territories.[8] In the first place, it is still an undecided question whether the result of the

[8] Section 10 (a), in relevant part, provides as follows: "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce * * * *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any in-

Board's declination of jurisdiction is to confer jurisdiction upon the local government. Only recently, in *Garner* v. *Teamsters Union,* 346 U. S. 485, 488, and *Building Trades Council* v. *Kinard Construction Co.,* 346 U. S. 933, the Supreme Court expressly reserved that question as it had done under the original Act in *Bethlehem Steel Co.* v. *N. Y. S. L. R. B.,* 330 U. S. 767, 776. Compare also *Garmon* v. *Building Trades Council,* 37 L. R. R. M. 2233 (Calif. Sup. Court, decided December 2, 1955); with *N. Y. S. L. R. B.* v. *Wags Transportation System,* 130 N. Y. S. 2d 731 (Sup. Ct., 1954). Secondly, even if the local government acquires jurisdiction by virtue of the Board's refusal to exercise its jurisdiction, such power results by operation of law, rather than by cession, for in merely declining to assert jurisdiction in a given area there is "no concession or delegation of power." *Bethlehem* case, *supra,* at 776. Finally, if the provisions of Section 10 (a) bar the Board from declining jurisdiction over an industry subject to the Act which is located in the Territories the same provision for identical reasons would prohibit the Board from declining to assert jurisdiction over an interstate business located in the States. For, on the one hand, if as petitioner implies (Pet. br., p. 6, 18), such declination by the Board is an evasion of Section 10 (a) with respect to industry in the Territories, it is an evasion with respect to industry in the States. On the other

dustry * * * even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."

hand, if as petitioner inconsistently argues (Pet. br., pp. 9, 17, 18), the doctrines of preemption prohibit local governmental regulation of a labor dispute arising in an industry over which the Board may, but does not, assert jurisdiction, thereby creating a "no-man's land" not subject to any governmental regulation, this void results whether the industry is located in one of the States or in one of the Territories. And indeed, Section 10 (a) makes no distinction between Territories and States.

In sum, the very considerations which establish the existence of the Board's power to decline jurisdiction with respect to industries engaged in interstate commerce located in one of the States likewise establish that the Board has authority to decline jurisdiction with respect to enterprises located in one of the Territories. Conversely, the identical arguments by which petitioner would deny the Board such authority with respect to industries in the Territories apply with equal force with regard to the Board's refusal to assert jurisdiction over State industries engaged in interstate commerce.

II. The Board's determination to decline jurisdiction in the instant case was neither arbitrary nor capricious and is binding on review

A. The scope of judicial review

The broad discretion vested in the Board regarding the exercise of its statutory jurisdiction necessarily restrictively circumscribes the scope of judicial review. In the words of this Court, "The general rule is that, where the Board has jurisdiction, * * *, whether such jurisdiction should be exercised is for

the Board, not the courts, to determine." *N. L. R. B.* v. *Stoller*, 207 F. 2d 305, 307, certiorari denied, 347 U. S. 919; see also *N. L. R. B.* v. *Daboll*, 216 F. 2d 143, 144–145 (C. A. 9), certiorari denied, 348 U. S. 917; *Katz* v. *N. L. R. B.*, 196 F. 2d 411, 413 (C. A. 9); *Haleston Drug Stores, Inc.* v. *N. L. R. B.*, 187 F. 2d 418, 421–422 (C. A. 9), certiorari denied, 342 U. S. 815; *N. L. R. B.* v. *M. L. Townsend*, 185 F. 2d 378, 383 (C. A. 9), certiorari denied, 341 U. S. 909; *Optical Workers' Union* v. *N. L. R. B.*, 227 F. 2d 687, 691, 2351 (C. A. 5) petition for rehearing denied January 19, 1956, 37 L. R. R. M. 2350, 2351; *Local Union No. 12* v. *N. L. R. B.*, 189 F. 2d 1, 4 (C. A. 7), certiorari denied, 342 U. S. 868.

The reasons underlying this repeated holding by the courts are manifest. The determination of the most efficient allocation of agency resources, time, personnel and public funds, involves the resolution of many imponderable factors which are not readily subject to judicial review. Like political questions, which are "essentially legislative or administrative" (*Federal Radio Commission* v. *General Electric Co.*, 281 U. S. 464, 469), there are no "satisfactory criteria for judicial determination" (*Coleman* v. *Miller*, 307 U. S. 433, 454–455; see also *C. & S. Air Lines, Inc.* v. *Waterman Steamship Corp*, 333 U. S. 103, 111). It is for the Board to determine the "policy regarding what cases it should assert jurisdiction over, in order to effectuate the purposes of the Act. It is in regard to the shaping of such policy—wherein flexibility is so essential—that we hold that juristic concepts * * * have no conclusive relevance." *Optical Workers'*

Union v. *N. L. R. B., supra.* Particularly is this true where, as here, the factors underlying the Board's administrative determination concern the efficient allocation of public funds, personnel and time.

This is not to say, however, that the Board enjoys a completely unbridled discretion in this regard, or that the Board may act in an arbitrary and capricious manner. The Board, of course, recognizes that it, "like any other quasi-judicial agency, has no authority to act capriciously or arbitrarily." *Breeding Transfer Co.,* 110 N. L. R. B. 493, 495. What these judicial precedents do establish, rather, is that the Board has a great latitude in this area where "factors outside [the Court's] domain of experience may come into play." *Phelps Dodge Corp.* v. *N. L. R. B.,* 313 U. S. 177, 195.

We turn now to the question whether the Board's policies regarding the Territories and its application to the case at bar can be said to be arbitrary or an "abuse of its discretion".

B. The Board's determination that it would not effectuate the policies of the Act to assert jurisdiction in the instant case was neither arbitrary nor capricious

In 1950, following a long study of the cases where the Board had declined jurisdiction, the Board issued a series of decisions enunciating the standards which were to govern its exercise of jurisdiction in the future. Thereafter, with 3 years experience behind it, the Board, on October 26, 1954 issued another series of decisions establishing revised standards which, "in the light of the Board's experience * * * and also in the light of changing economic con-

ditions," seemed warranted. *Breeding Transfer Co.*, 110 N. L. R. B. 493, 494. In establishing these revised standards the Board was guided by the very same criteria spelled out by the Board at the time of the enunciation of the original standards in 1950. Thus, the Board stated (110 N. L. R. B. at 497):

> * * * our new standards are in a large measure a result of a careful study and consideration of the many valuable analyses contained in those committee reports [of legal assistants]. This is not to say that our final decision was not ultimately one of policy and of considered judgment by the Board members themselves. By their very nature the standards which we now anounce cannot be proved scientifically like mathematical problems. In making these modifications, we have given due consideration to all of the criteria spelled out by the Board in 1950, including (1) the problem of bringing the case load of the Board down to manageable size, (2) the desirability of reducing an extraordinarily large case load in order that we may give adequate attention to more important cases, (3) the relative importance to the National economy of essentially local enterprises as against those having a truly substantial impact on our economy, and (4) over-all budgetary policies and limitations.

Manifestly, the Board properly revised the standards in the light of changed conditions and experience gained since their adoption in 1950, and the standards, based on the criteria set forth in 1950, were reasonable. *Optical Workers' Union Local 24859 et al.* v. *N. L. R. B.*, 227 F. 2d 687, 691 (C. A. 5), petition for

rehearing denied, 37 L. R. R. M., 2350 (January 19, 1956).

Although the revised standards were enunciated with respect to businesses affecting commerce located in the States, the Board was immediately thereafter confronted with the problem regarding enterprises located in the Territories. In *The Virgin Isles Hotel, Inc.,* 110 N. L. R. B. 558, the Board was faced with the problem of whether the longstanding policy not to exercise jurisdiction over hotels located in the States should apply to the Territories despite the Board's previous policy to assert "plenary jurisdiction over all business enterprises operating" in the Territories (110 N. L. R. B. at 559).[9] After reexamining the earlier decisions, the Board concluded that although hotel operations in the Territories, as in the States, were not unrelated to commerce, the impact on commerce of a labor dispute by hotel employees in the Territories was insufficient to warrant the assertion of jurisdiction because "the relationship to commerce is no greater here [in a Territory] than in the case of a hotel operating in one of the 48 States (*ibid.*). Again, when confronted with a similar problem relating to taxicabs operating in the Territory of Alaska,[10] a local retail bakery located in the Commonwealth of Puerto Rico,[11] and a radio station also located in the Commonwealth of Puerto Rico,[12]

[9] The Board previously asserted jurisdiction over hotels located in the Territories. *Roy C. Kelly*, 95 N. L. R. B. 6 (hotel located in the Territory of Hawaii).

[10] *Union Cab Company*, 110 N. L. R. B. 1921.

[11] *Sixto Ortega*, 110 N. L. R. B. 1917.

[12] *South P. R. Broadcasting Corp.*, 111 N. L. R. B. 272.

the Board on similar reasoning declined to assert jurisdiction. Finally, when the Board was once again confronted with the question of asserting jurisdiction in one of the Territories on the basis of its "plenary" power, since the business operations were insufficient to meet the jurisdictional standards, the Board decided to decline jurisdiction, stating (*Conrado Forestier,* 111 N. L. R. B. 848):

> Since the promulgation of the new jurisdictional standards, the Board has held where specially applicable rules have been established, similar enterprises situated in the Territories are required to conform to the same jurisdictional criteria as are applicable in the 48 States. In those earlier cases, the Board indicated that no exception as to the Territories was warranted: that the impact on commerce of business operations having their situs in the Territories is no greater than that of similar enterprises located in the 48 States. * * * Accordingly, * * * in future cases the Board's entire jurisdictional standards will be uniformly applied in the Territories as in the several States.

In concluding that the general jurisdictional standards should apply to the Territories, the Board was recognizing the same considerations involved in formulating the State jurisdictional standards, namely, the number of undecided cases, limitations of budget, personnel and time, necessity of giving adequate attention to the more important cases, and the relative importance to the National economy of pending labor disputes. Obviously, the essentially local industries whose operations are largely confined

within the boundaries of one Territory are not likely to have as substantial an impact upon commerce as those industries which are not so confined. Moreover, the backlog of undecided cases has remained inordinately large, well over 4,000, notwithstanding the increased efficiency of the agency in processing contested cases.[13] In these circumstances the Board had no choice but to draw a line so as to perform its duties most effectively. Admittedly the Board might have drawn the line differently,[14] but to say that the line might have been drawn differently, does not mean that the line which the Board did draw was unreasonable. Indeed, as the Supreme Court has said, "when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it

[13] In the fiscal year 1953, there were nearly 15,000 cases filed with the agency, of which more than 3,000 required processing to final decision by the 5-man Board. *N. L. R. B. Eighteenth Annual Report* (G. P. O., 1954) pp. 1, 93. The backlog of undecided cases at the end of that fiscal year amounted to 4,289, notwithstanding the substantial reduction in time required to process contested cases resulted in 3,053 decisions, the largest number of such cases during any one year in the Board's history. *Id.* at 5. By the end of the fiscal year 1954, the backlog had risen to 4,394 undecided cases. *N. L. R. B. Nineteenth Annual Report* (G. P. O., 1955) p. 155.

[14] Thus, for example, the Board might have decided to assert jurisdiction over wholly intra-Territorial industries which had in excess of a specified volume of business. In this connection, it is noteworthy that the two members who failed to join in the majority decision in *The Hotel Virgin Isles, Inc.*, 110 N. L. R. B. 558, disagreed with each other. Member Peterson, who concurred in that decision not to assert jurisdiction, expressed doubts that the Board should exercise jurisdiction in the Virgin Isles in any case. Member Murdock argued that the Board should assert jurisdiction because it has "plenary" jurisdiction in the Territory.

precisely, the decision of the [Board] must be accepted unless * * * it is very wide of any reasonable mark." *Addison* v. *Holly Hill Fruit Co.*, 322 U. S. 607, 611. So judged, the Board's decision to apply its jurisdictional standards to the Territories cannot be said to be "wide of any reasonable mark," either with respect to the factors underlying the formulation of the jurisdictional standards or with respect to the resultant policy which enables the Board, while declining jurisdiction over essentially small local enterprises, to concentrate its resources in determining controversies arising in the more important industries, whether such industries are located in the States or the Territories.

Although variously stated in its brief (pp. 4, 9, 12–13, 17), petitioner's only argument to the contrary is that the Board "ignored" or "refused to consider" the phrase "within * * * any Territory" which is contained in Section 2 (6) of the Act. In petitioner's view, the Board was compelled to adopt separate standards regarding trade "within" the Territories, in light of their location, size, and economic development, so that, in the case at bar, the Board should have asserted jurisdiction on the basis of the $226,000 intra-Territorial sales made by the Company.

It does not follow, however, from the fact that the Board ultimately decided to apply the State standards to the Territories, instead of establishing a different standard respecting trade "within * * * any Territory," that the Board either ignored the statutory language or failed to consider the local conditions of

the Territories.[15] On the contrary, as the cases show, the Board did consider the circumstances of the Territories and the business enterprises affected. Thus, in three cases (*supra,* pp. 18–19) preceding *Conrado Forestier,* 111 N. L. R. B. 848, the Board specifically stated the nature, size and location of each business and concluded that, at least where special standards had been adopted for the assertion of jurisdiction in the States, there was not sufficient reason for declining to apply these standards to the Territories. And in the *Conrado Forestier* case itself the Board noted that the "sole issue stems from the fact that the Employer's business is located in a Territory." See also the dissenting opinions of Member Murdock in these cases. Moreover, as petitioner notes in its brief (pp. 15–16), the Board did adopt a special standard for the District of Columbia, asserting its "plenary" jurisdiction without limitation (*M. S. Ginn & Co.,* 114 N. L. R. B. No. 25; *Carlyle Hotel of Washington, Inc.,* 36 L. R. R. M. 1542; *Dodge Hotel Co.,* 36 L. R. R. M. 1542). In adopting this special standard the Board's decisions recognized the special circumstances of the District of Columbia, including its unique character as the seat of the National Government, its small area and its proximity to the States of Maryland and Virginia, and the resultant dependence of commercial activities carried on within the

[15] In this connection it is noteworthy that the Court of Appeals for the District of Columbia Circuit in *N. L. R. B.* v. *Eanet,* 179 F. 2d 15, 18, suggested that the Board should have applied the same standards to the District of Columbia that it had previously adopted with respect to a business located in one of the States.

District of Columbia upon the channels of interstate commerce.[16]

Accordingly, there is no merit in petitioner's argument that the Board, by applying the State standards uniformly to all of the Territories, was arbitrary and capricious in failing to take cognizance of "trade * * * within * * * any Territory." Admittedly the application of these standards to the Territories may exclude local Territorial enterprises from the scope of the Board's processes notwithstanding that these enterprises are important in the economy of the Territories. The Board, however, has the paramount duty under the Act to consider its obligations in the light of the importance to the National economy, not merely the significance to any one Territory. In so doing the Board may properly weigh the benefits of asserting jurisdiction over local enterprises operating "within" a Territory in the light of its limited administrative resources and determine, as it did, that the overall policies of the Act would be better effectuated by declining to assert jurisdiction solely on the basis of intra-Territorial business.

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[16] For these reasons, there is manifestly no warrant for petitioner's contention that the Board established "arbitrary and unreasonable 'jurisdictional standards'" because the standard adopted for the District of Columbia was different from the standards applied in the States and Territories (Pet., br., p. 19). Moreover, this contention is in conflict with petitioner's repeated assertions in its brief, such as at page 9, that the Board failed to consider the special circumstances of the Territories, such as the "location, size and economic and industrial development of the Territories." In any event, even if the Board erred in formulating the standard applicable to the District of Columbia, this does not establish that the Board was arbitrary in previously establishing a different standard applicable to a soft-drink company in the Territory of Alaska.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for review herein should in all respects be dismissed.

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FEBRUARY 1956.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, *et seq.*), are as follows:

Short Title and Declaration of Policy

Section 1. (a) This Act may be cited as the "Labor Management Relations Act, 1947".

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

TITLE I—AMENDMENT OF NATIONAL LABOR RELATIONS ACT

SEC. 101. The National Labor Relations Act is hereby amended to read as follows:

"FINDINGS AND POLICIES

"SECTION 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest * * *

"Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

"Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

"It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encourag-

ing the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * * * *

DEFINITIONS

SEC. 2. When used in this Act—

* * * * *

(6) The term "commerce" means trade, traffic, commerce transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country, any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be af-

fected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8 (a) It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment; * * *

(b) The Board shall decide in each case whether in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: * * *

* * * * *

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial num-

ber of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), * * *

* * * * *

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * *

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

* * * * *

"PREVENTION OF UNFAIR LABOR PRACTICES

"SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This

power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

* * * * *

"(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * * *

"(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have

power to grant such temporary relief or restraing order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with repsect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

"(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to

make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive."

U. S. GOVERNMENT PRINTING OFFICE: 1956